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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 576

STINSON CANNING COMPANY AND AMERICAN SURETY COMPANY (399 CASES, MORE OR LESS, BEACH CLIFF BRAND MAINE SARDINES, ETC.), PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 30-35), is reported at 170 F. 2d 764.

JURISDICTION

The judgment of the Court of Appeals was entered November 11, 1948 (R. 35), and a petition for rehearing (R. 36-45) was denied January 3, 1949

(R. 46). The petition for a writ of certiorari was filed February 19, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, upon a finding that the claimant had failed over a period of eight months to comply with decrees entered pursuant to the Federal Food, Drug, and Cosmetic Act condemning certain lots of canned sardines and providing for their release to the claimant for the purpose of segregating, if possible, the diseased and undiseased sardines and destroying the former, the District Court abused its discretion in ordering the forfeiture of performance bonds without affording the claimant further time and opportunity to show that its default was not wilful or the result of gross neglect.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, section 304, 52 Stat. 1040, 1044 (21 U.S.C. 334), provides in part:

> (a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, * * * shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found. * * *

* * * * *

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold: *Provided,* That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this Act or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Act under the supervision of an officer or employee duly designated by the Administrator, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. * * *

(e) When a decree of condemnation is entered against the article, court costs and fees, and storage and other proper expenses, shall be awarded against the person, if any, intervening as claimant of the article.

STATEMENT

In April 1947, separate libels were filed in the District Court for the Eastern District of South

Carolina under the Federal Food, Drug, and Cosmetic Act, *supra,* for the condemnation of eight lots of canned sardines on the ground that they were diseased (see R. 3, 8, 25, 30). Petitioner Stinson Canning Company intervened and claimed ownership of the sardines (R. 19, 30). It admitted the allegations of the libels and consented to the entry of decrees of condemnation (R. 19, 25). Consent decrees were accordingly entered on October 11, 1947, which provided, in accordance with Section 304(d) of the Act, *supra,* that petitioner Stinson could retake possession of the condemned sardines upon posting bonds in specified amounts, conditioned upon the following undertakings: Stinson would proceed to segregate the sardines so as to effect a separation of the cases or cans containing diseased fish from those containing fish not diseased. If such a segregation were accomplished to the satisfaction of a representative of the Food and Drug Administration, only the cases or cans found to contain diseased fish were to be destroyed; otherwise, the entire lots were to be destroyed. The decision of the Food and Drug Administration as to whether the salvage operation had been satisfactorily completed was to be final. Stinson was not to ship or sell, or offer to ship or sell, any of the sardines until they were released by the Food and Drug Administration. A time limit of three months from the entry of the decrees was imposed for the segregation and destruction of the sardines.

The District Court expressly retained jurisdiction of the proceedings, and the decrees further provided that in the event of default by Stinson in the performance of any of the specified conditions, the bonds should be forfeited on motion of the Government, and judgment entered thereon. (R. 25-27.)

Bonds in the aggregate amount of $20,020, conditioned upon these undertakings, were filed by petitioner Stinson as principal and petitioner American Surety Company as surety (R. 21, 23, 30). Stinson then shipped the sardines to its plant in Maine, but they remained unsegregated and undestroyed at the end of the three-month period (see R. 4). On January 19, 1948, a 90-day extension, to April 18, 1948, was granted by the District Court, with the proviso "that no further extension shall be applied for by the said Claimant" to perform the acts required by the decrees (R. 28; see also R. 22).

On May 25, 1948, a motion was filed by the Government for judgment on the bonds and for an order directing the destruction of the condemned sardines on the ground that petitioner Stinson had not complied with the terms of the decrees of October 11, 1947. The motion papers, which were served upon petitioners (R. 22-23), recited that Stinson had failed either to separate or destroy the sardines, and had not indicated to the Food and Drug Administration if and when they intended to destroy them, despite the efforts of that agency to

cooperate in the supervision of performance with the provisions of the decrees (R. 3-7).

No written return was filed in opposition to the motion, but on the day set for the hearing, June 7, 1948, counsel for petitioner Stinson appeared before the District Court and, as an oral return, stated that it had been found impractical to segregate the sardines and admitted that they had not been destroyed. A motion was made at that time for modification of the decrees to permit export of the condemned articles. Counsel explained to the court that the tolerance for diseased sardines shipped abroad was higher than that permitted by the Food and Drug Administration for domestic consumption, and, in view of the food shortage in other countries, use might be made of the condemned sardines. Counsel stated further that he had made a similar motion in another proceeding which was pending in the federal district court at Buffalo, New York, and that action on such motion was being held in abeyance pending a decision on the issue in another case by the Court of Appeals for the Second Circuit. Counsel also stated that he had informed a Mr. Sullivan of the Boston Station of the Food and Drug Administration that he intended to use the Buffalo proceeding as a test case to govern the disposition of several libels involving Maine sardines which were pending in various parts of the country. (R. 8-11, 17.) He admitted, however, that he had been advised that the Food

and Drug Administration was opposed to the granting of permission to export food which had been condemned (R. 10-11, 12).

The motion to amend or modify the decrees to permit export of the sardines was denied on its merits and for untimeliness (R. 17, 24). The District Court also denied a continuance to permit petitioner Stinson to produce Mr. Sullivan to support its contention that it had not acted in bad faith in not complying with the terms of the decrees (R. 18-19). The court found that Stinson had been guilty of dilatory conduct, that the return was inadequate, and that petitioners were in default on the performance bonds (R. 17, 23-24). Judgments in the amount of each of the bonds, together with the costs of the proceedings, were awarded to the Government (R. 24, 30).

On appeal to the Court of Appeals for the Fourth Circuit, the judgments were affirmed (R. 35).

ARGUMENT

It is clear that the failure of petitioners to segregate and destroy the condemned sardines within the prescribed time constituted a breach of the conditions of the bonds. Petitioners contend in effect that their oral return to the Government's motion for judgment on the bonds raised an issue of good faith in respect of the default and, therefore, they were entitled to a trial of that issue. This contention is based upon the premise that the District Court had power to remit all or part of the penalty

upon a finding that the default did not result from gross neglect or bad faith.

These bonds were penal and not indemnatory. *Fresh Grown Preserve Corp.* v. *United States,* 143 F. 2d 191 (C.A. 6); *Fresh Grown Preserves Corporation* v. *United States,* 144 F. 2d 136 (C.A. 4). On the breach of the conditions, the Government was entitled to recover the full amount without proof that any damages had been sustained. *Clark* v. *Barnard,* 108 U. S. 436; *United States* v. *Diecker-hoff,* 202 U. S. 302. We do not believe that the District Court had power to remit any part of the bonds after determining that the conditions had been broken. Congressional approval of judicial remittance of penal bonds appears to be limited to bail bonds.[1] See Rule 46(f), F. R. Crim. P.[2] But, as the Court of Appeals properly observed (R. 32), it is unnecessary to consider that question, for it is clear in any event that the District Court was fully

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[1] Cf. 18 U.S.C. 646 (1946 ed.), now 18 U.S.C. 3617.

[2] *Paris* v. *United States,* 137 F. 2d 300 (C.A. 4), upon which petitioners rely (Pet. 7) as establishing a principle in conflict with that of the decision below (the same court decided both cases), holds merely that since a district court has discretion to remit the penalty on a *bail* bond, a proper exercise of discretion required the court to give consideration to the defendant's explanation that his default was induced by representations of the district attorney and thus was not wilful. In the case at bar, on the other hand, apart from the distinction that remission is probably not available in any event, it is clear that even if full acceptance were accorded to Stinson's excuse for noncompliance with the decrees, the District Court properly exercised its discretion in holding the excuse insufficient and in ordering a forfeiture of the bonds.

justified in decreeing forfeiture in full. The trial judge found that "the whole course of this case has been one of complete dilatory action on behalf of the claimant" (R. 17). In its opinion, the Court of Appeals reviewed at length the factual basis for this finding and agreed that petitioners' conduct was "extremely dilatory" (R. 33) and that "They have offered an utterly insufficient excuse for such grossly neglectful behavior" (R. 34).

Petitioners were admonished on January 19, 1948, after the original three months' period for compliance had expired, that an extension of 90 days was granted with the express understanding that no application would be made for any further extension (R. 28). Petitioners had almost eight months, from the entry of the decrees (October 11, 1947) until the return date of the Government's motion for judgment on the bonds (June 7, 1948), to perform their undertakings. They were notified by the court in advance that judgment would be granted against them unless the matter was disposed of within the time limit (R. 11). Despite these explicit directions, petitioners disregarded the efforts of the Food and Drug Administration to cooperate in the segregation and destruction of the diseased food and made no attempt to comply with the provisions of the decrees (R. 3-7). Noncompliance persisted right up to the hearing on the motion for forfeiture (see R. 13).

The return of petitioners did not raise any material issue of fact. The decrees required them either

to segregate the condemned sardines and destroy that part which was diseased or to destroy the entire lots. If, as petitioners contend, Stinson contemplated resort to a third alternative, i.e., the exportation of the sardines without segregation (a procedure, incidentally, which has not received either administrative or judicial approval, *United States* v. *Kent Food Corporation,* 168 F. 2d 632 (C.A. 2), certiorari denied, 335 U. S. 885), it was incumbent upon them at least to ask the District Court to modify its decrees, instead of ignoring them completely until the hearing on the motion for forfeiture of the bonds.

Petitioners urge (Pet. 7) that the decision in this case is in conflict with *Fresh Grown Preserve Corp.* v. *United States,* 143 F. 2d 191 (C.A. 6). To the contrary, the two decisions are entirely consistent. In the case cited, the claimant filed an affidavit in opposition to the motion for forfeiture in which it stated that its failure fully to comply with the provisions of the decree "was not occasioned through any fault of the claimant" but was due to the failure of the Food and Drug Administration to cooperate in the supervision of its performance. The court held that this attempted justification did not raise any material issue of fact, since the only issue was whether the claimant had actually complied with the decree. "The course pursued by the agency appears to have been either arbitrary or neglectful, but this afforded appellant no right to

violate the law. The appellant's appropriate course would have been to move the district court for an order directing the Federal Agency to perform forthwith its function under the decree. The aid of the court was not thus invoked. To the contrary, appellant deliberately violated the court's order by its own admission." 143 F. 2d at 196.

Likewise, in the case at bar, if petitioners' return to the motion for forfeiture had raised an issue whether or not they had complied with the provisions of the decrees, they would have been entitled to a hearing on that issue. But no such issue was presented and the trial judge properly exercised his discretion in refusing to grant any further extensions of time for compliance with the decrees.

CONCLUSION

The judgment below is clearly correct and no conflict of decisions is involved. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

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